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SUPREME COURT, U.S.

No. 98-637

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

LARRY W. SHIVES,

Petitioner

v.

CSX TRANSPORTATION, INC.,

Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether a railroad worker assigned to work at a marine terminal where 15 percent of his work activities comprise the loading and unloading of maritime cargo, spends "at least some of his time" in indisputably longshoring operations per *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977) such as to afford him exclusive coverage under the Longshore Harbor Workers' Compensation Act for injuries sustained on the job?

PARTIES TO THE PROCEEDING

Petitioner Larry W. Shives is a resident of Maryland.

Respondent CSX Transportation, Inc. is a Virginia corporation with its principal place of business in Jacksonville, Florida, and is a wholly owned subsidiary of CSX Corporation, a publicly traded holding company incorporated under the laws of, and maintaining its principal place of business in, the State of Virginia.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent CSX Transportation, Inc. respectfully prays that Mr. Shives' Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit be denied.

STATEMENT OF THE CASE

While it concurs with the statement of the case contained in the Petition for Certiorari, Respondent adds that the parties stipulated that "15% of the tasks assigned to CSXT's carmen such as Shives involved the loading and unloading of maritime freight." (Opinion of the Circuit Court, at App. 3 to the Petition).

REASONS FOR DENYING THE PETITION

I.

THE CIRCUIT COURT CORRECTLY APPLIED THIS COURT'S DECISIONS IN *P.C. PFEIFFER CO., INC. v. FORD* AND *NORTHEAST MARINE TERMINAL CO. v. CAPUTO* IN HOLDING THAT PETITIONER WAS COVERED EXCLUSIVELY BY THE LHWCA BECAUSE SOME OF HIS EMPLOYMENT ENCOMPASSED INDISPUTABLY LONGSHORING OPERATIONS

In its discussion of the 1972 Amendments to the LHWCA, which broadened the scope of coverage and established a two-pronged situs/status test to determine such coverage, this Court held, as to the "status" requirement:

> It seems clear that when Congress said it wanted to cover "longshoremen," it had in mind persons whose employment is such that they spend at least some of their time in indisputably longshoring operations . . . .

Northeast Marine Terminal Co. v. Caputo, 4342 U.S. 249, 273 (1977) (emphasis added). The Circuit Court correctly found that Petitioner was such a person. Because 15% of Petitioner's regularly assigned work activities involved assisting with the loading and unloading of maritime cargo, the Circuit Court held that Petitioner spent "at least some of his time" in indisputably longshoring operations.

The Circuit Court also found correctly that to require a "time of injury" test as part of the LHWCA's "status" requirement, as urged by Petitioner, would disregard this Court's stated position that "maritime employment" is an occupational, rather than geographic, test in which "the crucial factor is the nature of the activity to which a worker may be assigned." *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 82 (1979) (emphasis added). Further, to condition LHWCA applicability on the nature of an employee's particular activity at the moment of injury would, as so eloquently stated by Mr. Justice Blackmun, "bring the 'walking in and out of coverage' problem back with a vengeance." *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 50 (1989) (Blackmun, J., concurring).

CONCLUSION

For the reasons stated above, Respondent CSX Transportation, Inc. respectfully prays that *certiorari* be denied.

This 28th day of October, 1998.

Respectfully submitted,

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